



November 8, 2002

Ms. Jan Clark
Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2002-6383

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171977.

The City of Houston Police Department (the "department") received a request on August 20, 2002 for "all audio and video tapes of the [department's] raid of the K-Mart parking lot at 8400 Westheimer on Saturday, August 17 and Sunday, August 18," and a request on August 27, 2002 for "[t]apes of radio transmissions and transcripts of MDT transmissions made by officers" during the same raid. You state that there are no responsive videotapes.¹ You have submitted an audiotape responsive to both requests and transcripts of MDT transmissions responsive to the August 27, 2002 request as representative samples of the remaining requested information. You claim that the remaining requested information, is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the

¹We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

At the outset, we must address whether the procedural requirements of the Act have been met in this instance. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the department received the request for all audio tapes of the raid on August 20, 2002. Accordingly, the department had fifteen business days, or until September 11, 2002, to submit a copy of the specific information requested or representative samples thereof. Section 552.308 of the Act provides in relevant part:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail properly addressed with postage prepaid and:

(1) it bears a post office cancellation mark indicating a time within that period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within that period.

Here, the information responsive to the August 20, 2002 request was not sent via first class United States mail. Accordingly, you have not satisfied the requirements of section 552.308 that when met would allow governmental bodies to comply with deadlines established by the

²We note that your argument that section 552.130 applies to the responsive audiotape was not timely made. See Gov't Code § 552.301(b) (governmental body required to state exceptions to release that apply to requested information within ten days of receipt of request). However, we will consider your argument that section 552.130 applies to the responsive audiotape as section 552.130 protects the interests of third parties. See Gov't Code § 552.302 (government body must provide compelling reason to overcome presumption of openness); see also *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 630 (1994).

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Act by sending required requests, notices, or other documents via first class United States mail prior to the applicable deadline. As this office did not receive the submitted audiotape until September 12, 2002, we find that you have not met the required fifteen business day deadline as to the August 20, 2002 request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is made confidential by another source of law or when third party interests are at stake. *See Open Records Decision No. 150 (1977)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Section 552.108, on the other hand, is a discretionary exception, and so ordinarily will not overcome the presumption of openness raised by section 552.302. *See Open Records Decision No. 177 (1977)* (governmental body may waive statutory predecessor to section 552.108); *but see Open Records Decision No. 586 at 3 (1991)* (need of a governmental body, other than the one that failed to timely request a decision, may in appropriate circumstances be a compelling reason for non-disclosure). Here, your section 552.108 claim does not constitute a compelling reason to withhold the information in question. Accordingly, the department may not withhold the audiotape under section 552.108. Section 552.103 is also a discretionary exception that does not make information confidential, and thus, does not constitute a compelling reason to overcome the presumption of openness. *See Open Records Decision No. 551 (1990)* (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential). However, as section 552.101 can provide a compelling reason to overcome the presumption of openness raised by section 552.302, we will consider your arguments under section 552.101 as they apply to the information responsive to the August 20, 2002 request together with the information responsive to the August 27, 2002 request.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality provisions such as Family Code section 58.007, which you argue applies to the submitted information. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The responsive information relates to the arrests of numerous juveniles. However, neither the audiotape nor the MDT transcripts identify specific individuals. Since

specific juvenile suspects are not identified, we find that the submitted information is not protected from disclosure under section 58.007 of the Family Code.

You also argue that the submitted information is excepted from release pursuant to section 552.101 in conjunction with section 143.089 of the Local Government Code. Section 143.089 of the Local Government Code contemplates two different types of personnel files: one that the civil service director is required to maintain as part of the officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (information reasonably relating to officer's employment relationship with department and maintained in the department's internal file pursuant to section 143.089(g) is confidential). In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to that investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records are subject to disclosure under the Act. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). You explain that at the time the department received the requests, the department had ongoing criminal and internal affairs investigations. While we generally agree that a police department's records of ongoing internal affairs investigations that have not resulted in disciplinary action are confidential under section 143.089(g), the information at issue is contained in department records separate and apart from those of the internal affairs investigation. The police department may not engraft section 143.089's confidentiality onto other records that exist independently of the internal affairs investigation. Thus, the department may not withhold the submitted audiotape or MDT transcripts under section 552.101 in conjunction with section 143.089(g).

You also claim that the responsive information is excepted from release pursuant to section 552.101 in conjunction with section 143.1214 of the Local Government Code. Chapter 143 of the Local Government Code encompasses civil service rules for municipal fire and police departments. Subchapter G of chapter 143 is applicable to a municipality with a population of 1.5 million or more, including the City of Houston. Subchapter G includes section 143.1214 of the Local Government Code, which provides in relevant part:

(b) The department shall maintain . . . any document in the possession of the department that relates to a charge of misconduct against a firefighter . . . that the department did not sustain, only in a file created by the department for the department's use. The department may not release those documents to any agency or other person except another law enforcement agency or fire department.

Local Gov't Code § 143.1214(b). As stated before, you argue that the submitted information is part of an ongoing investigation regarding allegations of misconduct by department officers. However, as the information at issue is also contained in department records separate and apart from those of the internal affairs investigation, the department may not withhold the submitted information pursuant to section 552.101 in conjunction with section 143.1214.

Next, you argue that the submitted audiotape and MDT transcripts contain information subject to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The submitted MDT transcripts and audiotape contain Texas license plate numbers. Accordingly, you must withhold these license plate numbers pursuant to section 552.130. However, two license plate numbers included in the MDT transcripts are not identified as Texas license plate numbers. As section 552.130 only applies to Texas motor vehicle information, you may not withhold these two license plate numbers pursuant to section 552.130 unless they are Texas license plate numbers. If the two unidentified license plate numbers are in fact Texas license plate numbers, you must withhold them pursuant to section 552.130. As you have not established further compelling reasons to overcome the

presumption of openness created by section 552.302, we find that you must release the remainder of the audiotape responsive to both requests.

We now consider your remaining arguments against release of the information responsive to the request received by the department on August 27, 2002. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the responsive MDT transcripts “are part of open and active criminal investigations” into the events surrounding the K-Mart raid being conducted by the Harris County District Attorney’s Office (the “district attorney”). Upon review, we agree that some of the submitted MDT transmissions relate to the K-Mart raid. Based upon your representations, we conclude that release of the portions of the submitted MDT transcripts that relate to the K-Mart raid would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, you may withhold the portions of the MDT transcripts that we have marked pursuant to section 552.108. However, we find that the department has not sufficiently explained how release of the remainder of the MDT transcripts would interfere with the district attorney’s investigation or prosecution of the raid. Accordingly, you may not withhold the remainder of the MDT transcripts pursuant to section 552.108. Although section 552.108(a)(1) authorizes you to withhold the information we have marked from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. *See* Gov’t Code § 552.007.

Finally, we consider the applicability of section 552.103 to the remaining portions of the MDT transcripts. Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the government body received the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref’d n.r.e.*); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a). You state that a lawsuit was filed against the City of Houston regarding claims arising out of the K-Mart raid on August 26, 2002. You have submitted the plaintiff’s original complaint from that litigation for our review. Pursuant to

section 552.103(c), the litigation must be pending as of the date the request for information is received. Here, the request for the MDT transcripts was received August 27, 2002. Accordingly, you have established that litigation was pending as to the second request for information. However, you do not explain, nor does the submitted information make clear, how the remaining portions of the MDT transcripts relate to the pending litigation. Accordingly, we find that you have not established the applicability of section 552.103 to the remaining portions of the MDT transcripts. As you make no further arguments against release of the MDT transcripts, you must release the remaining portions of the MDT transcripts.

In summary, you must withhold the Texas license plate numbers contained in the submitted MDT transcripts and on the submitted audiotape pursuant to section 552.130. You must withhold the unidentified license plate numbers on the MDT transcripts pursuant to section 552.130 only if they are Texas license plate numbers. You may withhold the portions of the MDT transcripts that we have marked pursuant to section 552.108. You must release the remaining responsive information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

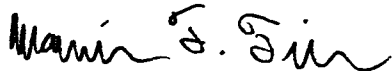
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 171977

Enc. Submitted documents

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